No. 191.

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Brief of Mattingly & Darlington for Appellees.

Filed Mar. 4, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 191.

BRAINARD H. WARNER AND LOUIS D. WINE, *Appellants*,
vs.
LILY ALYS GODFREY.

BRIEF FOR APPELLANTS.

W. F. MATTINGLY,
J. J. DARLINGTON,
Solicitors for Appellees.

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vs.

LILY ALYS GODFREY.

BRIEF FOR APPELLANTS.

Statement of the Case.

On March 26th, 1896, the appellee and her mother conveyed to one Stephen A. Dutton lots 1, 2, 3 and 66, in square No. 134, in the City of Washington, together with other property, the beneficial ownership of which lots is claimed to have been held by appellee. The consideration of this conveyance was an agreement by Dutton to convey to her certain property in the City of New York, to which property, some months later, she learned Dutton had, in fact, no title. At the time of her conveyance to Dutton, there was an incumbrance of $10,000 on lots 1 and 66, held by the Provident Trust Company of Philadelphia, an incumbrance of $3,500 on lot 2, and an incumbrance of $4,000 on lot 3.

Shortly after receiving this conveyance, Dutton came to Washington, bringing a letter of introduction from a prominent and influential business man of New York to Mrs. Ellen S. Mussey, a member of the local bar, and endeavored here to negotiate a larger loan upon the property above described. Failing, after diligent effort, to accomplish this, he authorized her to make sale of the property for the sum of $25,000. She thereupon called upon the firm of B. H. Warner & Co., composed of the appellants, Mr. Clarence B. Rheem and G. W. F. Swartzell,

her interview being principally with the appellant Wine, to whom she offered the property at the price named, stating, also, that Mr. Dutton would allow a commission of three per cent. upon this sale, two-thirds of which commission she would allow to appellants' firm. After some conference, the appellants themselves concluded to make the purchase, and designated L. W. Richardson, a young and unmarried nephew of Mr. Wine, to take the title, in accordance with what the undisputed testimony, by the witnesses on both sides, shows to be the usual custom in Washington where two or more persons having wives unite in the purchase of property, and especially where it is encumbered, requiring the renewal of mortgages, etc., the object being the greater convenience in making the necessary subsequent conveyances.

Accordingly, on the 10th day of April, 1896, Mr. Wine left at the office of Mrs. Mussey a preliminary contract of sale, blank as to the vendor, who was then unknown to the appellants, and signed by Mr. Richardson, which Dutton signed later. This memorandum was upon a printed form prepared for use by B. H. Warner & Company in cases in which they were agents for the vendors, and was in the words and figures following:

"BRAINARD H. WARNER. LOUIS D. WINE.
GEO. W. F. SWARTZELL. CLARENCE B. RHEEM.

Office of B. H. Warner & Co.,
916 F St. N. W., Washington, D. C.

Articles of agreement, made and entered into this 10th day of April, A. D. one thousand eight hundred and ninety-six, by and between ....., party of the first part and Louis W. Richardson, party of the second part, in manner and form following: The said party of the first part, in consideration of the sum of five hundred (500) dollars to *their* agents, B. H. Warner & Co., duly paid as a deposit, the receipt whereof is hereby acknowledged, hereby agree to sell unto the party of the second part, the

following-described real-estate in the city of Washington and District of Columbia; Lots 66, 1, 2 & 3, square 134, Wash., D. C.

For the sum of twenty-five thousand (25,000) dollars, which the said party of the second part agrees to pay to the said party of the first part as follows:

Seventy-five hundred (7,500) cash, balance, seventeen thousand five hundred (17,500) to be assumed, secured by deed of trust on the said described property, with interest at the rate of six per cent. per annum, payable ..... which amount is now upon the property and secured by a trust or trusts, and the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall execute, acknowledge and deliver to the said party of the second part, or to his heirs or assigns, a special warranty deed and conveyance, assuring to them the fee-simple of the said premises free from all encumbrances except as to the trust referred to above, which deed shall contain the usual full covenants. The terms of sale to be complied with in five days from the date hereof, and said deposit to be applied in part payment of the purchase of the said described real estate. Title to be good and marketable or deposit returned.

And it is understood that the stipulations aforesaid shall apply to and bind the heirs, executors, administrators, and assigns of the respective parties.

In witness whereof the parties to these presents have hereunto set their hands and seals the above day and date.

(Signed) S. A. DUTTON. [SEAL.]

(Signed) L. W. RICHARDSON. [SEAL.]

True copy:

HENRY J. GROSS,
Notary Public.

Nov. 17, 1896.

Signed, sealed and delivered in the presence of—

(Signed) ELLEN S. MUSSEY,
As to S. A. Dutton.

(Signed) C. B. RHEEM,
As to L. W. Richardson."

It will be observed from this preliminary contract that it purports to acknowledge the receipt by "the said party of the first part" of the sum of $500, "to their agents, B. H. Warner & Company, duly paid as a deposit"; and it is upon this phraseology of the preliminary contract that the present appeal principally turns.

The transaction was consummated upon the terms specified in this memorandum, and the difference between the agreed purchase price of $25,000 and the aggregate of incumbrances, taxes and expenses, was paid to Dutton by the Columbia Title Insurance Company, with which Company the necessary funds were deposited by the firm of B. H. Warner & Company on behalf of the purchasers.

On September 1st, 1896, the appellee filed her suit against Dutton, Richardson and others, alleging that her conveyance of the property above mentioned to Dutton was obtained by him through misrepresentation and fraud, that she had received no consideration therefor, and that the deed by Dutton to L. W. Richardson was without any valuable consideration, that Richardson was not an innocent holder for value, that he had no interest, legal or equitable, in the premises, and praying that the appellee might be re-invested with title to the property in controversy.

To this bill Richardson answered that he was an innocent purchaser for a valuable consideration, without notice of any equities of the appellee, and that his agents, the firm of B. H. Warner & Company, on his behalf, in good faith, in the usual course of business, and upon the faith of an examination of the title to the land made by the Columbia Title Insurance Company, had paid for the conveyance from Dutton $7,086.33, being the full amount of the $25,000 agreed to be paid, less taxes, the existing incumbrances upon the property, and the accrued interest thereon. The preliminary contract of sale was filed with the answer as an exhibit.

This answer, as will be seen, did not disclose the fact that Richardson held the title for the appellants. The reason for this omission is fully explained by the solicitor who prepared the answer, at pages 500 to 502 of the record. It appears, however, that the solicitor in question informed appellee's solicitor, the late J. M. Wilson, of the actual facts in the matter, and made a proposition to convey the property to the appellee upon repayment of the actual outlays of the appellants up to that time. Record, pages 503–504.

This proposition was not accepted, but was followed by an amended bill alleging that the appellants had such notice of the frauds of Dutton as to put them on inquiry, and to deny to them any benefit of the conveyance made by him; and, later, by an amended and supplementary bill to similiar effect, praying that the title to the property should be re-vested in her, subject only to the original incumbrances thereon. The amended and supplemental bill was followed by a long series of original and supplementary interrogatories addressed to the appellants, the object of the interrogatories being in part to show a prior acquaintance and course of dealing between them and Dutton, through which they were sought to be charged with notice of the character of the latter. The answers to the interrogatories denied all acquaintance with or knowledge of him prior to the transaction in controversy.

The original, amended and supplementary bills, with all the accompanying additional interrogatories, having been fully answered, and issue joined, the parties proceeded to the taking of testimony. At the first session for this purpose (the depositions not appearing chronologically in the record), the proposition to convey the property to the appellee on payment to the appellants of their actual advances was renewed, and declined on the ground that the

former proposition to this effect had not been "categorically offered;" that the appellee had now been obliged to incur heavy expenses in the cause, and that the appellants had purchased with a knowledge of such facts and circumstances as put them upon inquiry and deprived them of standing in equity. Record, page 160.

The issues under the pleadings were practically three, viz:

(1). That the sale of the property to the appellants was at so inadequate a price as to constitute a fraud, and to put the purchasers upon notice.

(2). That the circumstances of sale were such as to disprove the defense offered, viz: that of innocent purchasers, without notice.

(3). That the appellant Warner, contrary to his sworn answers in the cause, had been associated with Dutton in sundry previous transactions prior to the one in suit, thus furnishing presumptive evidence that he was familiar with the character of Dutton, and, in addition, impeaching the credit to be given to his answer and to his testimony in relation to the transaction.

It was upon the last of these three issues that the greater portion of the testimony in the cases, omitted from the present record, was taken. Its character is shown by the summary of it contained in the opinion of Mr. Justice Hagner, before whom the cause was originally heard. Record, pages 560–563.

At the original hearing, before the Supreme Court of the District of Columbia, every issue under the pleadings as they then stood was found for the present appellants, upon the grounds stated in the opinion last referred to, and the bill was dismissed.

On appeal to the Court of Appeals, every issue under the pleadings as they then stood was, in like manner, decided

in favor of the present appellants; but, because of the phraseology in the printed memorandum of sale before referred to, reciting the receipt of five hundred dollars by B. H. Warner & Company as agents of the vendors, and because of the fact that the firm of B. H. Warner & Company had received from Mrs. Mussey $500 of the commission paid by Dutton, it was held by that court that the present appellants, who were the real purchasers, "were at the time the controlling members of the firm of B. H. Warner & Company, real estate brokers, who appear in the preliminary contract as the agents of Dutton, and not of Richardson"; that "an agent to sell cannot, either directly or indirectly, become the purchaser at his own sale", and that "there can be no doubt, therefore, that this sale could have been annulled by Dutton upon a timely bill for that purpose, without regard to adequacy of consideration, or complete fairness in other respects," that "the inquiry in such a proceeding is not whether there was or was not fraud in fact," that "the transaction is what the inflexible rule of equity, founded in the soundest public policy, denominates a fraud in law, as differentiated from fraud in fact," and that this "right of Dutton to disaffirm the sale necessarily results to the complainant, for whom he must be regarded as a trustee by construction of equity." Record, 578-9.

The opinion of the Court of Appeals states that Richardson, in his answer, averred that he "purchased from the appellants as agents of Dutton;" but, as will appear upon reference to the answer of Richardson (Record, p. 12), this was simply an inadvertence upon the part of the learned Court. His answer clearly and distinctly alleges that the firm of B. H. Warner & Company were the agents of the purchaser, and although, as before stated, the preliminary contract was filed with the answer, the fact that B. H.

Warner & Company were agents of the purchaser and not of Dutton was so *manifest* that it was accepted by everybody in interest throughout the voluminous record and down to the hearing in that court; so that, notwithstanding the numerous amendments to the bill, all made subsequently to the filing of the answer and the preliminary contract, the Court of Appeals itself found the pleadings incompatible with relief upon the ground suggested by it without amendment. Such amendment is provided for as follows:

"It may be, that to obtain this relief the bill will have to be amended to some extent. If so, it can be done without reopening the case for further testimony." Record, p. 579.

Thereupon, on March 27, 1900, the appellee filed the further amendment to the bill which will be found at page 582 of the Record, alleging that appellants, as members of the firm of B. H. Warner & Company, were agents of Dutton to find a purchaser; that, as such agents, they were without legal right to become purchasers without his knowledge and consent; that they did not inform Dutton that they were the real purchasers, but concealed such fact from him; that their purchase was, for these reasons, "fraudulent at law and voidable at the election of said Dutton or of this complaint, for whom said Dutton held title under a constructive trust," &c., and concludes, for the first time, with an offer to pay the appellants, upon a reconveyance from them to her, "such sum, if any, as the court may find to have been paid by them or any of them, on account of said property, and which should in equity and good conscience be repaid them by her."

To this amendment the appellants answered, on the same day, denying that their said firm were agents for Dutton for any purpose whatsoever, and averring that the mention

of B. H. Warner & Company as agents of unnamed parties of the first part in the preliminary contract of sale grew out of the fact that the memorandum of sale in question was upon a printed form belonging to their firm, in which their names were printed as agents of the vendor, and that, by a purely clerical omission, the name of the firm was not struck out and that of Mrs. Ellen S. Mussey, who was the only agent of Dutton in the matter, inserted instead; that both the said Ellen S. Mussey and the said Stephen A. Dutton well knew, throughout the entire transaction, that the firm of B. H. Warner & Company represented the purchaser of the property, and in no way represented or claimed to represent Stephen A. Dutton; that the defendants had received notice from complainant's solicitors that they would appeal to the court, simultaneously with the filing of her amendment, for a decree requiring the appellants to convey the property to her upon the terms specified in the opinion of the Court of Appeals, without affording them an opportunity to take any testimony to disprove the allegation of the amendment that the firm of B. H. Warner & Company were agents for Stephen A. Dutton, and that the defendants claimed they were entitled to answer that allegation, then for the first time brought forward against them, and to take testimony in their defense in that regard. The answer, however, recited the fact that the appellants had, at the beginning of the controversy, offered to restore to the complainant the property in dispute upon terms of being reimbursed their actual expenditures; that she had insisted, on the contrary, in the effort to regain her property without such reimbursement, by seeking to establish against them express and flagrant frauds and perjury, through testimony which the courts had found to be wilfully and consciously false, thereby subjecting them to an expense exceeding six thousand dollars, and that, as they were

advised and believed, it was an incompetent and inequitable departure, after having been defeated in that attempt, and after having refused every overture, now to amend her bill and demand a reconveyance of the property upon the very terms repeatedly and persistently rejected by her, and without reimbursement of the burdensome costs to which she had subjected them by her refusal of their offers, and by her persistence in her erroneous charges against them and in her efforts to regain the property without any repayment of the purchase money paid by them. Record, pp. 583–5.

The Supreme Court of the District of Columbia, holding itself bound by the terms of the opinion of the Court of Appeals, on the very day that the amendment and answer thereto were filed, and without permitting the appellants to take any testimony in refutation of the claim that they were the agents of Dutton in the sale, decreed that they convey the property in controversy to the appellee upon payment by her to them of the moneys actually paid by them to Dutton and the sums paid by them in discharging the taxes and interest on the incumbrances, less such rents as they had received, and referred the cause to the auditor to state the accounts between the parties. Record, pages 585–6. The auditor accordingly made his report, deducting from the purchase-money paid by the appellants the $500 which came to their firm as a part of the commission, crediting them with only the principal of the taxes and interest paid by them, without allowing interest on those advances, and charging them with all rents received. The appellants claimed, before the auditor, that they should be allowed all costs of the litigation down to the time of the amendment, in view of their offers to the appellee, rejected by her, at the beginning of the suit to convey the property to her upon the precise terms upon which she was then claiming such reconveyance ; but the auditor found himself unable to

make this allowance, under the terms of the order of reference. Record, pages 586–588. His report was excepted to by the appellants, the exceptions were overruled, and a conveyance by the appellants to the appellee decreed upon payment of the advances as found by the auditor. Record, page 589. On appeal by appellants to the Court of Appeals, this decree was affirmed, and the present appeal taken to this Court. Record, pages 594–595.

Assignment of Errors.

As per the assignments of error filed in this Court, it is respectfully submitted that the court below erred—

1. In reversing the decree of the Supreme Court of the District of Columbia, passed in said cause on the 24th day of January, 1899.

2. In reversing the said decree upon a ground neither set up in the pleadings, presented in the lower court, nor set up by the appellee in any manner at any prior stage of the cause.

3. In allowing the appellee to introduce a new cause of action or ground of relief by amendment, after final decree below, accompanied by denial to the appellants of opportunity to take testimony or otherwise defend against the case presented by the bill as so amended.

4. In holding, upon the evidence in the cause, that the appellants were the agents of Stephen A. Dutton.

5. In holding that the appearance of the name of the firm of B. H. Warner & Co. as agents of unnamed vendors in the preliminary contract of sale of April 10, 1896, under the circumstances of the case as disclosed by the Record, constituted purchase of the property by the appellants "a fraud in law."

6. In confirming the decree of the Supreme Court of the District of Columbia of June 13, 1900, overruling the appellants' exceptions to the auditor's report.

7. In denying to the appellants interest upon the purchase-money, or upon the taxes, or upon the interest or other charges paid by them on account of the property in controversy, although charging them with the rents and profits.

8. In permitting the appellee, after decree against her carrying costs, and affirmed upon every point in dispute, to impose upon the appellants their costs of the litigation by setting up, by way of amendment, a wholly new cause of action, and praying relief upon the very terms proposed by them and declined by her at the beginning of the suit.

9. In holding that, in this cause, the question of costs is not reviewable on appeal."

As has already been pointed out, the Supreme Court of the District of Columbia and the Court of Appeals have concurred in finding adversely to the appellee and for the appellants, every issue raised by the pleadings, down to the time of the first hearing in the latter court. As to the issue principally litigated, the examination of the witnesses in regard to which constituted the greater part of this immense record, the conclusion of the learned justice who heard the case in the first instance was that "the entire testimony adduced in behalf of the complainant, designed to show that Warner was ever in the company of Stephen A. Dutton on either of the occasions as described, is absolutely untrue, and that by far the greater part of it consists of unfounded falsehoods, uttered from bad motives, and attempted to be sustained by deliberate perjury." Record, page 560. And this was so unanswerably manifest upon the record that, as pointed out in the opinion of the Court of Appeals, the appellee's counsel in that court admitted the failure of her testimony upon that point, and was commended by the court for so doing. Record, page 574.

This court, having repeatedly declared its indisposition to interfere with the concurring judgments of the courts below upon questions purely of fact, in the absence of obvious error or serious mistake in the consideration of the evidence (Furrer vs. Ferris, 145 U. S., 132; Morgan vs. Daniels, 153 U. S., 120, 123–4), and since the ground upon which the appellee, by her last amendment to her bill, prayed for and obtained relief below is wholly unconnected with either of those questions, it is not the purpose of appellants to discuss in this court the remaining original issues, viz: Whether the sale was at an inadequate price, such as to constitute a badge of fraud and to put the purchaser on notice, and whether the circumstances of the sale were such as to impeach the defense of an innocent purchaser, without notice. The brief below, upon these questions, on behalf of the appellants, will be added as an appendix to this brief, for the convenience of the court in case either of them should be urged upon its attention on behalf of the appellee.

The several assignments of error may, for convenience, be grouped under the five propositions following, viz:

I.

Was it not error below to treat the printed reference in the preliminary contract of sale to the firm of B. H. Warner & Company as agents for the vendor of the property described, as conclusive evidence that they were such agents?

II.

Was it not error, not only to reverse the decree of January 24th, 1899, upon an issue not raised by the pleadings, and to permit their amendment for the purpose of raising it, but to require that, when so raised, it should be disposed of "without reopening the case for further testimony," thus denying the appellants the opportunity to prove the facts in

regard to the new issue thus raised, as averred in their answer?

III.

Was it not error, under the facts and circumstances in this case, to permit the appellee to make her amendment of March 2, 1900, and to decree a conveyance to her of the property in dispute upon the very terms upon which she had declined to receive it at the beginning of the litigation, except upon terms of paying costs to that date and reimbursing the appellants their expenses of the litigation?

IV.

Was it not error to disallow the appellants interest upon their outlays on behalf of the property, including taxes and interest upon incumbrances paid by them pending the litigation?

V.

Was it not error for the Court of Appeals to reverse the original decree of the Supreme Court of the District of Columbia?

I, II.

The first and second of these questions may conveniently be considered together.

The ground upon which the learned court below treated as conclusive the reference in the preliminary contract to Warner and Company as agents of the vendor has not been disclosed. The only supposable ground or analogy of which counsel have been able to conceive is the rule which forbids the alteration or contradiction of a written contract by contemporaneous parol evidence; and that this rule has no application to the mere recitals of a receipt, in or out of a deed, and even *inter partes*, is well settled.

Clapp v. Tirrell, 20 Pick., 247, 250; Paige v. Sherman, 6

Gray, 511, 513; Bower v. Bell, 20 Johns., 339; Stewart v. R. R. Co., 141 Ind., 55; O'Brien v. Gilchrist, 34 Me., 554; Ellis v. Willard, 5 Selden, 529; Burke v. Railway, 40 Minn., 35; Adams v. Davis, 109 Ind., 21; Thompson v. Maxwell, 74 Iowa, 415; Alexander v. Thompson, 42 Minn., 499; Bingham v. Weiderwax, 1 N. Y., 509; Millard *vs.* Hathaway, 27 Cal., 119; Davis *vs.* Snider, 70 Ala., 315; Leggett v. Buchhalter, 30 Miss., 421, 423; Louisville &c., Railway Co., *vs.* Power, 119 Ind., 269, 271; Md. Ins. Co. v. Ruden, 6 Cr., 338; Harris v. Johnston, 3 Cr., 317–18.

The case of receipts is an exception to the general rule that oral testimony is not admissible to contradict or vary a written contract. They are recitals, not contractual, and may always be explained by oral testimony. Brooks v. White, 2 Metc., 283, 287–8, and citations.

A receipt, though contained in a memorandum of sale, is not a contract, but merely evidence of the performance of a contract. Hildreth v. O'Brien, 10 Allen, 104.

If, then, the preliminary contract either were, or purported to be, a contract between Dutton and the firm of B. H. Warner and Company, this mere recital that the $500 deposit had been received by the latter as agents for the former, had nothing of a contractual character about it, nor anything which could estop either party from proving by parol that the recital was in this respect simply the result of a clerical inadvertence or mistake. That it was such a mistake, and that Warner and Company neither were nor were understood by Dutton to be his agents is, as hereinafter pointed out, entirely manifest both from the affirmative testimony upon the point which appears in the record, and from Dutton's conduct and manner of dealing with them in the transaction.

But, unless the rules of evidence do make the recital in the preliminary contract, though plainly a mistake, con-

clusive, then it was clear error to deny to appellants the right to take testimony, if further testimony were at all needed, upon the question whether Warner and Company were the agents of Dutton, when the appellee's amendment of March 27th, 1900, for the first time, made the question of such agency an issue in the case.

Up to the time of the hearing in the Court of Appeals, as before stated, there never had been any allegation that Warner and Company had been the agents of Dutton, nor any intimation to the appellants that the appellee, with the preliminary contract and all the other facts long before her, proposed ever to set up such a claim. The appellants naturally relied, as they had the right to do, upon the elementary proposition that a party may not state one case in his bill, and rely upon a different one in the evidence. The *allegata* must give the basis for the *probata*. (Boone v. Chiles, 10 Pet., 177.) A party can no more recover upon a case proved but not alleged, than upon a case alleged but not proved. Foster v. Goddard, 1 Black, 518.) The court can consider only what is put in issue by the pleadings—averments without proofs and proofs without averments are alike unavailing. (Washington Railroad v. Bradley, 10 Wall., 303.)

In departure from the rule repeatedly recognized by itself that a case will not be allowed to turn in an appellate tribunal, and especially where great expense has been incurred by the parties in the taking of testimony, upon questions not made below, even where they are jurisdictional (Tyler v. Moses, 13 D. C. App., 428, 422–3; Manning v. C. & P. Telephone Co., 29 Wash. L. R., 342, 344), the court below, in the case at bar, not only reversed the decree of January 24th, 1899, upon a question not made below or raised by the pleadings, but declared that, when introduced into the case by amendment, relief based upon it should be

granted with out re-opening the testimony, or allowing the appellants any opportunity to prove that, as matter of fact, no such claim to relief existed.

That this was serious error, it is respectfully submitted, is most apparent.

III.

The third proposition, it is submitted, presents a question of the plainest nature.

As appears from the uncontradicted testimony of Mr. E. H. Thomas, the original solicitor for the appellants (Rec., pp. 503–4), although the answer to the original bill for reasons which he explains did not disclose that the present appellants were the actual purchasers and beneficial owners of the property, that fact was fully explained by him to the late J. M. Wilson, the counsel for the appellee, and the proposition made to convey the property to her simply upon terms of reimbursing the appellants for their actual outlays, this offer being accompanied by an exhibition to Judge Wilson of the checks by which those outlays had been made and the certificate of title upon the faith of which the appellants had purchased. Her solicitor, thereupon, made an investigation, and found that these checks, or their proceeds, had actually been disbursed by the Columbia Title Insurance Company in the transaction as claimed. Then followed an announcement to appellants' solicitor that, instead of accepting his proposition, an additional bill would be filed which would "seriously reflect upon Mr. Warner," and that this bill would be "published in the public press of the city"—a threat which, on being communicated by the solicitor to the court, resulted in an order requiring the appellee to submit to the court any amendment which might be proposed by her before it would be allowed. Then, after the filing of the supplementary and amended bill, with the num-

erous interrogatories thereto, studiously omitting any proposition in the nature of reimbursement, the appellants, nevertheless, at the first session for the taking of testimony, as before stated, referred to and renewed their previous offer to convey the property to the appellee on being reimbursed their actual advances, accompanied with the uncontradicted statement that the offer had been made before any witness was examined or any notice given for the taking of testimony. Record, page 160. The proposition was thereupon in terms declined, and the case proceeded with by the appellee upon the theory that the appellants had been guilty of such actual fraud, accompanied by express notice and by actual perjury in regard to their acquaintance with and relations to Dutton, as to deny to them any standing in a court of equity, and to entitle the appellee to restoration of her property without any repayment to them.

It was in consequence of the appellee's rejection, at the beginning of the litigation, of these very terms upon which she now seeks a reconveyance, and of her insistence upon the attempt to escape them by fixing upon the appellants gross fraud and the gravest criminality, through testimony which both the lower courts have condemned, that the expense of the enormous record below was incurred, the taxable costs of the appellants for commissioners' fees alone aggregating $1,626, and their other necessary expenses in attempting to defend themselves from the charges in question amounting to $5,292.85.

While it is true that, ordinarily, solicitors' costs are left to be borne by the parties themselves, it is nevertheless within the province of courts of equity to allow them. There could scarcely be a stronger equity for their allowance, we submit, than the case of a complainant who has repeatedly refused to accept the only relief, voluntarily tendered her, to which she could under any circumstances be equitably

entitled who has persisted in an unfounded and costly litigation for years, on issues insisted upon by her which were wholly unfounded, who has compelled the parties in adverse interest to incur burdensome costs and expenses in the defense of themselves from utterly groundless charges of crime, unsupported by honest or reputable witnesses, and who only, after each and every of her allegations had been declared unfounded by both the original and the appellate tribunal, then asks to be allowed to claim, by an amendment to her pleadings, the very relief which her opponents had repeatedly tried to have her accept in the beginning, and without payment of the costs which her course alone has made necessary.

In the second opinion of the Court of Appeals, found at page 595 of the record, it is objected that, in so far as the appeal then before the court was concerned, it raised simply a question of an allowance of costs, and that this is not the subject of appeal. There are, however, it is respectfully submitted, two answers to this objection.

In the first place, this rule, applicable to questions of cost merely, is expressly excluded where the question of cost is involved with other questions raised by the appeal. The court has entire control of costs, as well as the merits, where it has possession of the case on appeal from final decree. Trustees vs. Greenough, 105 U. S., 527; Burns vs. Rosenstein, 135 U. S., p. 456; R. R. Co. vs. Car Co., 5 D. C. App., p. 548.

In the second place, the rule in question rests upon the ground that the allowance of costs, as ordinarily presented, is discretionary with the court of first instance, and, like other questions of discretion, is not ordinarily the subject of appeal. In the present case, however, the decree of the court of first instance does not represent its discretion, but its compliance with and obedience to the opinion and

mandate of the Court of Appeals in disposing of the first appeal to that tribunal. That mandate and opinion declared that the appellee should receive a reconveyance of the lands in dispute upon repayment to the appellant of "the money actually paid by them to Dutton, and all other sums that might have been paid by them in the discharge of taxes and incumbrances, less such sums as they may have received, or ought in the exercise of due diligence to have received, as rents and profits of the property since their possession began."

The trial court felt, and properly, that it was bound by the terms of the mandate and opinion; that it was not within its power to permit the appellants to take any testimony upon the new question of fact introduced by the amendment, that it could not even allow the appellants interest upon any of their outlays for the benefit of the property or to preserve it from tax or foreclosure sale, although charged with all rents received from it; and still less that it could exercise its own discretion in fixing any equitable terms in regard to costs, in addition to those fixed by the Court of Appeals. Its action was, as the Court of Appeals declares, "in strict conformity with the mandate of this court and the accompanying opinion." It could go no further in the matter of costs than to deny them to the appellee, and this it did.

With regard to the ordinarily taxable costs of the case, it is submitted that it would be most inequitable to permit the complainant to litigate a cause upon unfounded and untenable grounds in the first instance, to sustain in consequence a decree against her on those issues, including a decree for a very large amount of costs to which her opponents had been unjustly subjected, and then, by an amendment in the appellate tribunal, to introduce a wholly new and distinct ground for relief, and thereby to be relieved of her liability

for the costs incurred and already decreed against her because of her previous persistence in claims which both courts declare to be unfounded.

IV.

In the fourth place, we submit that the appellants were clearly entitled to interest on their outlays on behalf of the property, including taxes, and moneys paid out by them for interest upon the incumbrances placed upon the property by the appellee before her conveyance to Dutton.

The aggregate of these taxes and interest payments was $4,959.43. As shown by the record, after the dispute as to the value of the property had arisen, and it was claimed that the inadequacy of the purchase price was so great as to charge the appellants with notice of fraud, the appellant Warner proposed a sale of the property under these outstanding incumbrances, the validity of which was admitted by all the parties, so that a good title under them could be obtained, and which sale would, therefore, tend to determine its value. This proposition upon his part, however, was treated as fresh evidence of his desire to overreach the appellee and to obtain possession of her property by a forced sale, although unaccompanied by any offer upon her part to meet the interest charges, without which such a sale was inevitable. Thereupon, the appellants continued to pay them, their outlays of this character, down to the time of the auditor's report, being $3,795. No possible reason can exist, we submit, in equity or fairness, why they should not be allowed interest upon their said advances, or why the appellee should be entitled to the use of their money in preserving the property from the forced sale to which she objects, without allowing them any compensation therefor.

Their net outlays, at the time of the auditor's report, after charging them with all rents received, and, in effect,

with the five hundred dollars allowed their firm by Mrs. Mussey out of the commission on the sale, was $10,455.28. The major portion of this amount, as shown by the record, was borrowed money, upon which they themselves paid interest. If entitled to reimbursement at all, we submit that such reimbursement should include interest on these outlays.

V.

In the last place, however, we submit that the reversal by the Court of Appeals of the original decree in this cause, which dismissed the appellee's bill with costs, was erroneous, and should be itself reversed, reinstating that decree. The reversal in question was based upon the ground that the firm of which the appellants were members were agents for Dutton, and that, therefore, they were disqualified from becoming the purchasers. The claim that they were such agents rests only upon the printed form of preliminary contract above referred to, and upon the fact that the firm received from Mrs. Mussey $500 out of the commissions that she was allowed by Dutton for negotiating the sale.

As has already been mentioned, although this preliminary contract was filed as an exhibit to the answer of Richardson at the earliest stage of the controversy, the facts and circumstances of the transaction, as known to all the parties, were such that no one ever claimed, prior to the suggestion of the Court of Appeals, that Warner & Company were the agents of Dutton. This is apparent, not only from the opinion of Mr. Justice Hagner, in which all the contentions on behalf of the appellee are discussed *seriatim*, and from the assignment of errors in the Court of Appeals, which includes no such claim (Record, pages 569–70), but from the character of the cross-examination throughout the record, and the form of the interrogatories addressed by appellee's counsel to all the witnesses who were conversant with the

sale. The theory, throughout the litigation and down to the time of the hearing in the Court of Appeals, was, as indicated by the assignment of errors in that court (Record, page 570), that Warner and Wine had such facts within their knowledge as put them upon inquiry, and charged them with notice of the frauds of Dutton, and that they used Richardson's name in the transaction simply to conceal the fact that they were the actual purchasers, and thus exempt themselves from the consequences of such notice.

Fortunately for the appellants, in view of the fact that they were denied the privilege of offering any testimony after the issue now in question was raised, the testimony adduced in connection with the circumstances of the sale clearly and conclusively proves that they were not such agents.

With regard to the payment by her to the firm of B. H. Warner of the $500, Mrs. Mussey, at page 432 of the record, was examined, and testified as follows:

"Q. Will you state the circumstances under which you learned in the fall that Mr. Richardson was a dummy in that transaction and not the real purchaser?

"A. I have no recollection now about the circumstances.

"Q. So that at the time of this transaction, in April, 1896, when you agreed with Mr. Warner and Mr. Wine to share with them the commission, they to have two-thirds, or $500, and you to have one-third, or $250, so far as any knowledge that you had on the subject is concerned, you were treating with them *as the brokers of Louis W. Richardson, or whoever the purchaser was.* Is that so?

"A. I treated with them as the brokers, and had no interest in who purchased it, so long as the money was paid for it.

"Q. Do you know why it was that they concealed from you that they were the purchasers themselves, and allowed you to suppose that Richardson was the purchaser, and not a dummy?

"A. I never asked them about it, and I know nothing about it."

It is apparent, therefore, that B. H. Warner & Company were then claiming, and were then understood to be, the brokers of the purchaser, not the seller, and that the commissions were shared by Mrs. Mussey with that firm in that capacity.

That Mr. Dutton himself well knew that Messrs. Warner and Wine were not professing to be his agents is also shown by the testimony of Mrs. Mussey, who testifies, at page 382:

"I should like also to say that, on my second visit, I believe, to the office of Warner and Wine, at the request of my client, I asked if they would be willing to give him the privilege of repurchasing the property within a given time at an advance of $5,000, and Mr. Warner declined to tie up the property in that way, which fact I reported to my client."

The only member of the firm whom Dutton at any time met was the appellant Wine. As shown by the testimony of complainant's witness, Mr. Edmonston (page 109), Dutton had refused to allow the accrued taxes to be deducted from the purchase-money, and Mr. Wine was telephoned to go down and discuss that difference. Mr. Wine, at page 445, testified that he received this message, to the effect that Mr. Dutton "declined to make a deed for the property unless I would assume the accumulated interest and taxes on the property. I told him I would not do that at all; that he might consider the contract off if he made that demand, and Mr. Edmonston then insisted that I had better come over to his office, which I did immediately, and when I arrived there I found Mrs. Mussey, Mr. Dutton and Mrs. Dutton, to whom I was introduced by Mrs. Mussey. He and I had quite a little chat there about this accumulated interest and taxes, and finally I got a little cross and told him unless he

settled that way there would be no settlement at all, and I left the office, giving Mr. Edmonston that information—that unless Dutton allowed the accumulated interest and taxes in the settlement, there would be no deal with him. Later in the day, I learned that the transaction had been consummated as originally intended by the contract. I never had seen Dutton before, nor have I seen him since, neither had I ever heard of him before, nor did I know from whom we were purchasing the property, as may be shown by the contract that I drew. I left the party of the first part blank, to be inserted, which I believe is still in blank."

As further illustrating the position of the appellee and her counsel while the case was being prepared for trial, the following cross-examination of the witness Wine, at page 453, may be cited:

"Q. Why did you conceal from Mrs. Mussey, at the time of the purchase of said property in April, 1896, your true connection with the said transaction as purchaser, and *hold yourself out as the broker or representative of the dummy in whose name you took title to the property*, taking two-thirds of the commissions for selling the property to yourself?

"A. No motive at all, except as a matter of convenience to ourselves."

It is impossible, we submit, upon the record in this case, to hold that B. H. Warner & Company either were the agents of Mr. Dutton, or that he understood them to be. It was not surprising that, in view of the immense record which was presented in the Court of Appeals, that court, finding a reference to B. H. Warner & Company as the agent of the vendor in the preliminary contract, and that that firm had received a part of the commission, should have overlooked the testimony in the case bearing upon the subject, as above noted.

Let us suppose that Dutton had in all respects complied

with his engagements with the appellee, to her satisfaction, and that the present case was that of a bill filed by him to vacate the sale upon the ground that the blank printed form used in the preliminary contract described the appellants as his agent. What would be the inevitable result of such a suit, upon the facts proven? His agent, Mrs. Mussey, testifies that she understood B. H. Warner & Company to represent, not Dutton, but the purchaser, and she agreed to divide her commission with that firm upon that understanding. When she carried to them the preliminary contract, signed by Dutton, she, at his request, inquired whether they would not allow him the privilege of repurchasing the property at an advance of $5,000 within a given time, and was informed by them that they would decline to tie up the property in that way, which fact she reported to him. Then follow the circumstances, testified to by both Mr. Wine and Mr. Edmonston, of Dutton's refusal to allow deductions to the time of sale on account of accrued interest and taxes; the interview between Mr. Wine and himself at Mr. Edmonston's office upon that subject; his proposition that Wine should assume the accumulated interest and taxes on the property, Wine's refusal to do this, and his statement, on the contrary, that Dutton might consider the contract off if he made that demand; the termination of that interview by Wine's withdrawing, with instructions to Edmonston that the deal would be off unless the accumulated interest and taxes were allowed, Dutton's subsequent acquiescence in this demand of Wine's, and the consummation of the sale accordingly. We submit that it would be wholly impossible, upon such a conceded, undisputed state of facts, for Dutton successfully to claim, in such a suit as the present, that the reference to B. H. Warner & Company in the preliminary contract, as his agents, was anything more than the clerical error which the answer declares it to be, that he

understood that firm to be in any respects his agents, or that, on the contrary, he did not manifestly and clearly deal with them as the representatives of the purchaser, and as antagonistic to his interests, refusing to tie up the property by allowing him the desired right to repurchase, and declaring the sale off if he refused their demand for the allowance of taxes and interest to the time of sale.

It is respectfully submitted:

1. That the decrees of the Court of Appeals of February 8th, 1900, and of October 12th, 1900, should be reversed.

2. That the decree of the Supreme Court of the District of Columbia, of January 24th, 1899, was right, and should be reinstated and affirmed.

W. F. MATTINGLY,
J. J. DARLINGTON,
Solicitors for Appellees.

Appendix.

I.

Inadequacy of Price.

The area of the four lots in dispute is about 6,373 square feet, making the purchase price about $4.00 per square foot. The lots were unimproved, with the exception of a structure on lots 1 and 66, renting for about $50.00 per month, and which the witnesses on both sides agree added nothing to the market value of the lots, since it would require to be demolished before they could be utilized in such a manner as to yield any adequate return.

Twenty witnesses were called on behalf of the complainant to testify that the price paid was inadequate, while a still larger number, comprising a majority of the leading real-estate brokers in the city of Washington, and a number of property holders besides, testified to the contrary.

The question presented in this connection, it is submitted, is, not whether the value was, or was not, in fact, greater than the price paid, but whether there was any such disparity between the price and the value as to convince a Court of Equity that the vendees must have known, and did know, that the transaction was not one conducted in good faith by the vendor, and that it must have involved a fraud upon some one. The question was argued below, however, and is treated in the opposing brief here, as though the subject of inquiry were the actual adequacy or inadequacy of the price, and not a question of fraud and collusion between vendor and vendee, to be deduced from the supposed inadequacy.

In other words, the question was treated below, and here, as though a preponderance of evidence that the price was

inadequate would establish bad faith on the part of the purchasers, however numerous and credible the witnesses holding the contrary view. If Baumgras, Blankman, Bell, and seventeen other persons are right in supposing that the property was worth from fifty to one hundred per cent. more than the price paid, then, the argument is, any purchaser at that price is to be presumed guilty of fraud and bad faith, although such purchaser believed the price adequate, and was justified in so believing by the opinions of Chas. C. Duncanson, Robert I. Fleming, Thomas E. Waggaman, and twenty other leading real-estate dealers and property-owners in the city of Washington, any one of whom would be, in like manner, held guilty of collusion and fraud had he purchased upon the strength of his own opinion in the matter, and not upon that of the twenty persons subsequently collected as witnesses to a higher valuation, by the complainant.

If, however, the abstract or ultimate question of adequacy or inadequacy were assumed to determine the merits of this case, it is respectfully submitted that the weight of testimony is strongly with the appellees. And in the consideration of this question, the attention of the Court is respectfully invited to the superior prominence and qualifications as experts on values of the defendants' witnesses, taken as a whole, to those of the witnesses for the complainant.

The brief of the learned counsel for the appellant contents itself, in this connection, with enumerating the witnesses for the complainant, connecting with each such fact or circumstance as is supposed to give weight to his testimony, and wholly eliminating the evidence of its weakness, on the one hand, and, on the other, enumerating the witnesses for the defendants, with a like annexation to each of some supposedly disparaging circumstance connected with him. For example, complainant's witness Kent is

stated to be a "builder and dealer in real-estate," and that he made an offer for the property December 12, 1895, at a valuation of $51,000.00; complainant's witness Mimack is represented as living "very near the property," and as having "bought and sold real-estate and loaned money upon it for eighteen years;" complainant's witness John S. Blankman is described as "attorney and investor since 1875," etc., etc. The fact is wholly omitted that Kent is a Government clerk at a salary of $1,200.00 per annum, speculating in real-estate after office hours (Rec., pp. 142–4); that he owned no property which had not at least two or more incumbrances upon it (pp. 144–6), and that his offer of $51,000.00 was, not in money, but in mere equities, at fanciful values, one piece of property being offered at $28,000.00 which cost him less than $18,000.00, another piece being included in the offer at $12,000.00 which cost him less than $7,500.00 (pp. 146–8), etc.; that Mimack's transactions in real-estate were on two or three occasions only, the last of which was nine years before he testified (Rec., p. 159), etc.; that Blankman had made no sale since 1886 or 1887, the amount involved in that sale being only $1,500.00, that he had had but two real-estate transactions on his own account within the past ten years, and that he could name no clients for whom he had either purchased or sold property, or for whom he had made any loans (Rec., p. 156–7), etc. On the other hand, defendants' witness John A. Hamilton is described as a "grocer," ignoring his testimony that he has been a purchaser and owner of real-estate in Washington since 1870, and has appraised property for loans aggregating several millions of dollars (284–5); Robert I. Fleming is described as an architect and builder who disclaims being an expert in real-estate values, omitting his statement that he has had experience in real-estate and its value for thirty-one years (Rec., p. 392),

that he has bought and sold a great deal of real-estate in the northwest section of the city, and within a couple of squares of the property in controversy, being very nearly the pioneer in this locality (Rec., p. 393–4), and that he has bought and sold a great deal of real-estate in that section, having examined the property in controversy, itself, before its sale to the appellees, with a view to purchasing it (Rec., p. 395), etc.

Complainant's witness Beverley H. Robertson testifies that he has not bought or sold much real-estate (Rec., p. 138); her witness Frederick C. Stevens testifies that he has had nothing to do with real-estate since 1892, and that his judgment was based solely upon reported sales, without personal knowledge of any (Rec., pp. 239–41); her witness James R. Ellerson, who is quoted in the brief as valuing the property at $7.00 per square foot, testified that it is worth that much "if somebody could be found who wanted it—you could not sell it in the general market for that" (Rec., p. 244), and adds that he has never sold any property for as much as $4.00 per square foot (Rec., pp. 245); the witness Banes, quoted at $7.00 per square foot, states that his estimate is based on a sale to somebody who would want to build a handsome residence, that there are not many who desire $40,000.00 sites, and that it would be all "guess-work" to say how long it would be before a purchaser could be found at such a price (Rec., p. 248–9). The witness Wm. B. Gurley, who puts no valuation upon the property, but simply says that, if his, he would not sell it for less than $7.50 or $8.00 per square foot, is shown by the record, in his capacity as a sworn, official appraiser, to have appraised lot 1 at $3.00 per foot, lots 2 and 3 at $2.00 per square foot, and lot 66 at $2.25 per square foot (Rec., pp. 255, 323-4), the witness Deeble, quoted as fixing the value at between $6.00 and $7.00 per

foot, sold lot 3 to complainant's mother, in 1890 or 1891, before the panic, for $3.00 per square foot (Rec., pp. 261); the witness Davidson, quoted at from $6.00 to $6.50, testified that this valuation was for a purchaser who desired it for a residence, and that, from one who desired it for an investment, not more than $5.00 could have been realized (Rec., p. 268); the witness McLachlen, quoted as valuing the property at from $47,000.00 to $48,000.00, never sold a residence site for any price approximating that sum, his largest sale being at $16,000.00, for a lot with a house already on it (Rec., pp. 269–70)—never sold an unimproved site for more than $5,000.00 (Rec., p. 271), and never made a loan as large as $4,000.00 on a single residence site, knew of no sales in that locality for as much as $4.00 per square foot, and was employed to sell this property for a considerable period before the sale to Dutton, but never succeeded in receiving any offer for it (Rec., pp. 271–3).

Complainant's witnesses, Wight, Robertson, Fitch, Saunders, Dulaney and Deeble, also had the property in controversy in their hands for sale for years prior to the Dutton transaction, without ever receiving an offer for it. The witness Baumgras claims to have received several offers, but, upon cross-examination, these are shown to have been like those made by the witness Kent. Baumgras testifies that he cannot state what the properties were worth which were offered in exchange (Rec., p. 184), and that, in them, the parties offering had already mortgaged the property which they proposed to give for all that such property would bear, and that they would simultaneously have increased the mortgage on the Godfrey property, thereby realizing five or six thousand dollars in cash, and that this was the incentive to their several offers (Rec., pp. 132–3).

The value of the judgments of the witnesses Tyler and Dulaney upon the subject may be estimated by the fact that

both swear that the inability of half a dozen real-estate agents to sell the property at approximately their valuation, after five or six years of effort, and the fact that it might remain unsold for years, with accumulating taxes and loss of interest, would not at all effect their estimate of the value. The witnesses Chas. J. Bell, Stilson Hutchins, Frederick C. Stevens and others, testify that such contingencies would very materially affect the market value of the property.

There are, concededly, among complainant's witnesses several gentlemen whose opinions are entitled to respect. Mr. James E. Fitch values the property at $6.00 per square foot (Rec., p. 158), but adds that, although the property was in his hands in 1895, he never received an offer at any price; that he would not have considered it a bargain at the valuation he names; that he does not know what it would have brought at a forced sale, and that he has not known of a single sale of residence property since 1896, with such an area as this, at a price approximating anything like the valuation given by him. (162–'64). Mr. John Joy Edson, who thinks that the property was worth $40,000.00, and that a loan of $25,000.00 could have been obtained upon it, states that if his valuation committee, composed of Messrs. Hamilton, Wine and Fox, had valued the property at $4.00 per square foot, his institution would not have made any such loan (167), and he further admits that, in the valuation he placed upon the property, he supposed it embraced a considerably larger area than it did in fact include (549). Mr. Chas. J. Bell, who is quoted at a valuation of $6.00 per square foot, testifies that this value is only to a person who might wish the property for his own use, not to one purchasing to sell again (229); while Mr. Hutchins, quoted at from $6.00 to $8.00 per foot, states that his estimate is based upon a com-

parison with what he had heard other property had sold for, that it was not a quick-moving class of property, and that one or two transactions in the neighborhood might be a very inadequate criterion for judgment (Rec., pp. 233–4).

This brief will not be protracted by summarizing the testimony of each of the witnesses for the defense. Mr. Linkins, valuing the property at about $4.00 per square foot at private sale, had sold three lots in the same square, besides making loans in that square (277, 279–80). Messrs. John A. Hamilton and Albert F. Fox had been appraisers for the Washington Loan and Trust Co. and Mr. Chas. C. Duncanson, appraiser for the American Security and Trust Co., these three concurring in a valuation of from $4.00 to $4.50 per square foot, at private sale, and not for investment or speculative purposes (289, 309, 319). The opposing brief quotes Mr. Hamilton at $5.00 per square foot, ignoring the fact that this valutation was made upon an erroneous impression as to the area of the lot, and corrected by the witness at page 289. Albert A. Wilson, engaged in real-estate and insurance business since 1875, making loans for his insurance company, director of the Washington Loan and Trust Co., the National Bank of the Republic, the Real Estate Title and Insurance Co., and who had made all trustee sales for the Washington Loan and Trust Co., considers $4.50 per square foot a fair price at private sale, for the purpose of a private residence, not as an investment, and doubts if it would have brought $3.50 at public sale (Rec., pp. 290-92); Mr. Fairfax had sold a lot half a square distant on New Hampshire Avenue for $2.60 per square foot, and has various corner and other lots in the vicinity for which he has not been able to find purchasers at $2.25 per square foot (Rec., pp. 295–6); Louis P. Shoemaker, in the real-estate business both as capitalist and agent since 1876,

and who owns a valuable property quite near that in controversy, could see no money in this investment at $4.00 per square foot (Rec., pp. 296–8, 305–6); Mr. Chas. Early, quoted in the opposing brief at $5.00 per square foot, states simply that he thinks the property could have been sold at that price, " if there happened to be anybody who wanted so large a lot;" that there were comparatively few bidders at that time for such property (Rec., p. 992), and that he, himself, would not have paid $25,000.00 for the lot, unless buy it for some special purpose (Rec., p. 923); Matthew Trimble, the District Assessor, testifies that property in Washington, is assessed at about what is supposed to be its value at a forced or auction sale, and that the property in question was assessed, in 1896, lot 1, containing 991 square feet, at $3.00 per square foot; lot 2, containing 2,087 square feet, at $2.00 per square foot; lot 3, containing 1,950 square feet, at $2.00 per square foot, and lot 66, containing 1,339 square feet, at $2.25 per square foot, making an aggregate assessment of about $16,361.00 (Rec., pp. 323–4).

George E. Emmons, in the real-estate busines since 1869, and lately in charge of the real-estate business of the American Loan and Trust Co., thinks this property worth from $4.50 to $5.00 per square foot, for certain purposes, but would have hesitated to advise a purchase at the lower of these prices for investment (Rec., p. 337); Mr. Samuel Ross, who has purchased about $200,000.00 worth of real-estate in Washington, thinks the property in controversy was worth from $23,000.00 to $25,000.00 in April, 1896 (Rec., p. 341), and states that, three years ago, the property was brought to him for purchase, and was considered by him as being worth not over $25,000.00 (Rec., p. 340); W. Clarence Duvall, for twenty years a real estate dealer, considers the property in April, 1896, worth $4.50 per square foot, to a party desiring the whole ground for a

specific purpose, and that one buying on speculation would have to purchase at a lower figure to realize any profit (Rec., pp. 342–3; 941–2); J. Maury Dove purchased the southwest corner of New Hampshire Avenue and S street, containing 5,260 square feet, at $3.80 per square foot, after looking at and rejecting the property in controversy, as not being satisfactory or as desirable as the lot he purchased (Rec., p. 354–5). Clarence F. Norment, president Central National Bank, director of the American Security and Trust Co., real-estate dealer and the owner of considerable real-estate in Washington, valued the corner lot at $4.00 per square foot, and the remaining lots at from $3.25 to $3.50 per square foot (Rec., pp. 364-5); Thomas E. Waggaman, for over thirty years in the real-estate business, thought the property worth from $4.00 to $5.00 per square foot in April, 1896, (372), while Chas. G. Sloan (Rec., p. 410), John E. McLeran (Rec., p. 424), Thomas J. Owen, (Rec., p. 438), E. B. Townsend (Rec., p. 421), Walter R. Wilcox (Rec., pp. 375), and Robert I. Fleming (Rec., p. 392), concur in values ranging from $3.50 to $4.50 per square foot.

The defendant, Louis D. Wine, testifies that he thought there was probably a margin of $5,000.00 as profit on the transaction, and that his idea in making the purchase was to "make a little money on it" (Rec., p. 446). Mr. Warner (Rec., p. 531) testifies that the property was in his opinion worth between $25,000.00 and $30,000.00, and that he hesitated at first to go into the purchase, considering the margin too small on the large amount of incumbrances and the expenditure of money involved in the purchase, and that he is now convinced the price paid was too much.

The foregoing summarizes, it is believed, with entire fairness to both sides, the testimony upon the subject of values. If the case turned upon the weight of the testimony upon this question, it is respectfully submitted that that weight is with the defendants.

As stated above, however, the question is one of good faith, rather than of superior accuracy in judgment as to values.

If the theory of the complainant is correct, then had J. Maury Dove, Robert I. Fleming, Albert F. Fox, John A. Hamilton; Clarence F. Norment, Louis P. Shoemaker, Thomas E. Waggaman, or any other of the twenty-three witnesses called by the defendants, made the purchase, instead of Messrs. Warner and Wine, although there can be no question in the present attitude of the case that their testimony is unbiased and honest, yet they must have been branded as fraudulent purchasers and conspirators, because Messrs. Baumgras, Mimack, Blankman, Kent and the other witnesses for the complainant hold a higher estimate of value than they.

At page 15 of the brief for appellant, it is contended that the opinion of real-estate dealers and owners is too unreliable to be considered in this connection and that the true criterion in this case is the value Mr. Wight stated to Mr. Wine shortly after the purchase had been made, which valuation the brief states was that upon which the defendants acted. The foundation for this claim is not disclosed in the brief, nor to be found in the record. The contract of purchase was made before the interview of Mr. Wine with Mr. Wight, or the interview between Messrs. Wight and Warner.

So far from "relying" upon Mr. Wight's estimate, both defendants testify that they regarded that valuation as absurdly excessive, and that neither of them considered the property worth over $30,000.

It is deemed unnecessary, upon the state of the record in the present case, to follow the learned counsel in the citation of precedents, in which particular purchases were held to be at inadequate values. This Court in Anderson *vs.* White, 2 D. C. App., 408, decided that when property worth

$35,000.00 is sold for $20,100.00 at a deed of trust sale, the inadequacy of price is not so great as to shock the conscience or raise a suspicion of unfairness. The opinion of the learned justice below (Rec., p. 1261) cites several Maryland cases to similar effect. See, also, Eyre vs. Potter, 15 How.. 42, 60.

It is respectfully submitted upon the foregoing considerations, that the complainant's claim of fraud, collusion and bad faith, as deductions from the price paid for the property, is wholly unfounded.

II.

Surrounding Circumstances of Suspicion.

In the second place, it is claimed that the purchase of the property by Messrs. Warner and Wine was surrounded by suspicious circumstances, of a character sufficient to impeach their good faith.

These supposed circumstances of suspicion may be summarized as follows:

(*a*) That the property had been entrusted to B. H. Warner for sale at $55,000.00, and that their purchase was at $25,000.00.

(*b*) That the defendant purchasers took the title, not in their own names, but in the name of the defendant Louis W. Richardson.

(*c*) That, to the original and the first amended bills filed in the case, the defendant Richardson answered through a solicitor employed for him by Warner and Wine, not disclosing that he was a "dummy" for them, but asserting that he paid value.

(*d*) That the defendants, although entrusted by the complainant and her mother with the sale of this property at $55,000.00, did not notify them that Dutton had sold it or was offering to sell it for $25,000.00.

(e) That the sale was consummated in three days, and with the knowledge that Dutton had judgments against him in New York.

(a)

It is true that, some years before the transaction in dispute, Mrs. Godfrey had put the property in the hands of B. H. Warner & Co. for sale at $55,000.00, just as she had also placed it in the hands of numerous other real-estate agents, during the same period, for the same purpose and at the same price, among them, the complainant's witnesses Baumgras, Fitch, Deeble, Saunders, McLachlen, Wight and Robertson. The defendants had never had an offer for the property, nor had the fact that it was upon their books ever been brought to the personal attention or knowledge of Mr. Warner. The witness Dodge testifies that, when making out a new sales-bulletin sometime before the transaction in question, he wrote Mrs. Godfrey inquiring whether she desired the firm still to represent her, to which inquiry he received no answer, although the complainant testifies one was mailed to him. Whichever of these witnesses is correct in this particular, the sales-bulletin of the firm shows that the property had disappeared from their books for some months prior to the sale, and the defendant Wine testifies that he had forgotten the circumstance that it ever had been upon their books.

That the price asked was no criterion of its value was shown by the fact that, if we except the species of proposals testified to by Baumgras, no one of the numerous agents who had had it for sale ever received any offer for it, at any price, and that, with one or two exceptions, all of them agree that this asking price was grossly excessive, and that the property was incapable of sale at any such figure.

Complainant's witness Fitch, of the firm of Fitch, Fox & Brown, testified that his firm rarely considered prop-

erty as still in their hands, whether expressly withdrawn or not, after it had been with them a year or so unsold (Rec. p. 211).

The complainant, in refutation of this, offered in evidence a circular sales-bulletin of B. H. Warner & Co., which stated that property entrusted to them was considered in their hands until sold or expressly withdrawn; but the testimony in the case shows that this bulletin was issued subsequent to the time that this property was placed in their hands, and after it had disappeared from their books, being omitted from the very sales-bulletin thus offered.

(*b*)

In the second place, it is objected that placing the title in the name of the defendant Richardson was a "badge" of secrecy and fraud, notwithstanding the fact that the witnesses, on both sides, agree, without contradiction by any, that this is a usual and well-recognized practice in Washington, wherever property is bought by one or more dealers on their joint account, and especially where they are married men, having wives whose dower rights would attach, making them necessary parties to any subsequent conveyances.

This practice is testified to by Messrs. Fitch (Rec., p. 164) and Edmonston (Rec., p. 117), witnesses on behalf of the complainant, and by Messrs. Shoemaker (Rec., p. 298), Duncanson (Rec., p. 310), Norment (Rec., p. 371), and Waggaman (Rec., p. 372), and is not questioned by any witness on either side.

(*c*)

It is true that the defendants Warner and Wine provided counsel for their co-defendant and trustee Richardson, and that to the original and first amended bills in this case, simply calling for discovery as to whether there had been a

purchase for value and without notice, the answer of Richardson states that he gave value, and that he was an innocent purchaser without notice, not disclosing the fact that he was a mere trustee for his co-defendants.

The reasons for this form of answer are fully set forth in the deposition of Mr. E. H. Thomas, the solicitor in question (Rec., pp. 499–502). That there was no effort on the part of the solicitor to conceal from the complainant's counsel the real situation is further shown by the uncontradicted testimony of the same witness (Rec., pp. 503–4).

The testimony of Richardson (Rec., pp. 86–8), Wine (Rec., pp. 459–61), Warner (Rec., pp. 538–40) and Thomas, (Rc., pp. 499–502, 520–22), all four of the parties concerned, agree that this form of answer was not at the instance, or request, nor in any manner by the procurement, of the defendants Warner and Wine, but rested solely upon the judgment of the solicitor as to what was the proper form of answer to such a bill, under the rules of the court.

That no secrecy was aimed at is shown by the testimony of the witness Wight, who states that contemporancously with the purchase, and with the knowledge that he had been the agent of Mrs. Godfrey and the one most recently in communication with her, Wine told him that he had bought the property for $25,000.00, and that Warner made a similar statement to him very shortly afterwards (Rec., pp. 96–7). Complainant's witness Edson also states that Wine informed him very shortly after the transaction that he and Warner were the purchasers, and that they made no secret of it (Rec., p. 167). The testimony of the plaintiff herself shows that she first learned of the fact in question through a voluntary statement made to her representative in New York by the defendant Warner, who made no concealment of it, but readily communicated it when approached on the

subject (Rec., p. 210); while the testimony of Mr. Thomas shows that Wine and himself, also, voluntarily and fully disclosed the fact to complainant's Washington counsel before the amended bill was filed, offering at the same time, in view of the circumstances of the case, to surrender the property upon being reimbursed the amount of money they had actually advanced in the matter (Rec., pp. 503–4)—a proposition which was repeated on the record at an early stage of the testimony, and declined (Rec., p. 160).

(*d*)

In answer to her fourth objection, the testimony of the complainant's witness Wight shows that, prior to the sale, Mrs. Godfrey had communicated to him the fact that she had sold the property to Dutton, writing him, in addition, of Dutton's coming to Washington, requesting him to foster the grossly exaggerated figure at which she wrote him it had been disposed of to Dutton in the transaction, so that Dutton would not be "dissatisfied," Mr. Warner's testimony shows that, having learned, pending the transaction, that the property had at one time been on the books of his firm in the name of Mrs. Godfrey, he endeavored to ascertain her address with a view to communicating with her, and discontinued this effort only on being informed by her agent, Mr. Wight, that she had disposed of the property and had no longer any interest in it; while Mr. Wight, her most recent agent, and the one to whom she had just communicated the fact that she had disposed of the property at a valuation of $68,000.00, testified that he did not deem it necessary or important to communicate with her, although the defendants Wine and Warner informed him that Dutton was selling the property to them at $25,000.00, because she had informed him that she had disposed of the property and was no longer interested in it (Rec., p. 104).

In addition, Mr. Wine did write, contemporaneously, that the firm of B. H. Warner & Co. were the representatives of the purchaser, requesting her to forward to them the keys of the house, with which request she complied in a letter which is copied into the record, making no inquiry as to the price at which the property had been sold (Rec., pp. 14–15).

In the opposing brief, it is claimed that Mr. Wine's letter was disingenuous, in that it represented that the firm of B. H. Warner & Co. had arranged the sale for a purchaser. In this there was no misstatement. The firm of B. H. Warner & Co. was composed of B. H. Warner, Louis D. Wine, Clarence B. Rheem, and G. W. F. Swartzell. This firm, the testimony shows, took the property in charge, collected the rents, paid the interest, and otherwise represented the purchaser, or purchasers, down to the institution of the suit.

(*e*)

In reply to the fifth objection, the record shows that Mrs. Ellen S. Mussey, a member of the bar of this District, and a lady of good standing and repute, informed Messrs. Warner and Wine that the very object of Mr. Dutton in disposing of the property quickly and at a low price was in order that he might pay certain judgments which were pressing him in New York, and which were involving great sacrifices upon his part unless they were satisfied; and, further, that he came to her with a letter of recommendation from one of the best friends her husband ever had. This is corroborated by the testimony of Ezra J. Sterling, one of the complainant's witnesses, who testified that he was present when Dutton delivered this letter of recommendation to Mrs. Mussey; that it was from Mr. Twombley, a gentleman of high financial business standing in New York, and that

it was couched in terms which would naturally induce confidence.

Another ground of objection, resting upon the testimony of the witnesses Foulke, Gallivan, Warner, Wine and Rheem, is that Dutton paid one instalment of interest on the incumbrance on one of the lots in controversy accruing subsequently to the sale, namely, an instalment of interest upon the incumbrance held by the Provident Trust Co. of Philadelphia, Pennsylvania, and that the defendants Warner and Wine falsely stated, under oath in their answers, that they had paid all instalments of interests accruing after their purchase.

It is true that the defendants Warner and Wine did so state in their answers, and that they did not pay the first instalment of interest on that incumbrance accruing after their purchase, and that this instalment, which accrued in the month of May, 1896, was paid in the month of October, 1896, by the witness Gallivan for Dutton in Philadelphia.

In so far as the inaccuracy of the answer in this respect is concerned, the testimony of Messrs. Wine, Warner and Rheem show that the latter was in charge of this part of the business of B. H. Warner & Co.; that, when preparing to make their answers in response to interrogatories in regard to the payment of interest contained in the second amended bill, the defendants Warner and Wine called upon Rheem for information in that regard, and that Rheem mistakenly informed them that he had paid for them all instalments of interest accruing subsequent to the 13th day of April, 1896, the date of their purchase. Rheem states that all interest payments were made upon receipt of the notices from the holders of the incumbrances; that he paid all of these received, in this way, and that he was under the impression that all the holders of incumbrances had applied for and received their payments after April 13, 1896; that

chased, then, had any one of the twenty-three witnesses on their behalf, including a number of the most reputable and prominent real-estate dealers and property-owners in the City of Washington, become the purchasers instead of the appellees, they, too, must have been so convicted.

II.

That no one of the several surrounding circumstances relied upon to prove fraud, nor all of them together, are sufficient, especially in the light of the explanation of each of them which the testimony affords, to prove fraud, or, to employ the language of the Supreme Court in a case of this character, rise to "the dignity of a suspicion." (Smith *vs.* Gale, 144 U. S., 527.)

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